

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CAPRELL HILL,

Defendant-Appellee.

UNPUBLISHED

March 18, 2003

No. 238942

Wayne Circuit Court

LC No. 00-000811-01

Before: Griffin, P.J., and Neff and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the order dismissing charges against defendant after denying plaintiff's motion to admit preliminary examination testimony. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

At defendant's preliminary examination, Kendall Cowan testified that defendant made incriminating statements about an armed robbery and murder. On the morning set for trial, Cowan's counsel indicated that he was unwilling to testify at trial, and Cowan had sought to withdraw his own guilty plea in an unrelated case. Cowan made an unsworn statement that he had lied in the preliminary examination. The trial court denied the motion to admit Cowan's preliminary examination testimony, finding that the testimony lacked sufficient indicia of reliability. The prosecutor conceded that he could not proceed without Cowan's testimony, and the court granted defendant's motion to dismiss.

A trial court's decision to admit evidence is reviewed for abuse of discretion. *People v Adams*, 233 Mich App 652, 656; 592 NW2d 794 (1999). MRE 804(b)(1) provides that where a declarant is not available, the hearsay rule does not exclude testimony given as a witness in another hearing, if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. MRE 804(a) provides that a witness is unavailable where declarant is exempted on the ground of privilege from testifying or persists in refusing to testify despite an order of the court to do so.

While invocation of the Fifth Amendment is not expressly treated in MRE 804(a), courts will treat a witness who cites the Fifth Amendment as unavailable. *People v Meredith*, 459 Mich 62, 66; 514 NW2d 765 (1998). A preliminary examination provides a defendant with the opportunity and similar motive to develop testimony. *Id.*, 67. If the proposed testimony falls within a firmly rooted exception to the hearsay rule, admission of the testimony does not violate

a defendant's right to confrontation. *Id.*, 69. MRE 804(b)(1) is a firmly rooted exception to the hearsay rule, and evidence admitted under the rule bears satisfactory indicia of reliability. *Id.*, 71.

Defendant argues that he was not given an adequate opportunity to examine Cowan at the preliminary examination due to the limitations placed on cross-examination by the court. The court precluded defense counsel from asking Cowan about the crime he was charged with, stating that the evidence could be used against Cowan in his case. Defense counsel was not otherwise limited in her examination.

The trial court found that there were insufficient indicia of reliability supporting Cowan's testimony. However, *Meredith* held that where evidence is submitted under a firmly rooted hearsay exception, such as MRE 804(b)(1), the testimony bears satisfactory indicia of reliability without more. *Meredith, supra*, 67-71; *Adams, supra*, 659-660. The trial court abused its discretion in imposing a greater standard for determining the reliability of the proffered testimony.

Reversed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Hilda R. Gage